

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1451

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-1451

UNITED STATES OF AMERICA,

Appellee,

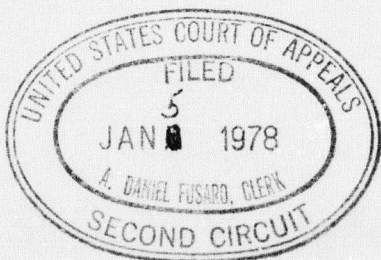
-v.-

JAMES PATRICK FLYNN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT
JAMES PATRICK FLYNN



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Table of Contents

Table of Cases	i
Table of Statutes	iii
Issues Presented	1
Statement of the Case	2
Preliminary Statement	2
The Government's Case	4
The Defense Case	7
The Government's Comment on the 5th Amendment	
Privilege in summation and the Court's cure in the charge.	7
The Sentence	9
ARGUMENT	11
POINT I: Evidence of presence in a room is not such evidence of possession of a stolen car which will support an 18 U.S.C. §2312 conviction.	11
POINT II: A charge on the defendant's right not to take the stand which omits to state that no unfavorable inferences may be drawn therefrom is constitutionally infirm.	15
POINT III: It is error to sentence a defendant for the commission of a crime on which the Jury has acquitted.	17
CONCLUSION.	17

Table of Cases

	<u>Page</u>
<u>Camilla v. United States,</u> 207 F.2d 339 (6th Cir. 1953)	12
<u>Fitzpatrick v. United States,</u> 410 F.2d 513 (5th Cir. 1969)	12
<u>Julian v. United States,</u> 391 F.2d 279 (9th Cir. 1968)	14
<u>People v. Armstrong,</u> 31 A.D. 2d 447, 298 N.Y.S. 2d 630, (1st Dep't 1969)	15
<u>United States v. Brown</u> 511 F.2d 920 (2d Cir. 1975)	16
<u>United States v. Casey,</u> 428 F.2d 229 (5th Cir.) <u>cert. denied</u> , 400 U.S. 839 (1970)	13
<u>United States v. Cusumano,</u> 429 F.2d 378 (2d Cir.) <u>cert. denied</u> , 400 U.S. 820 (1970)	15
<u>United States ex rel. Leak v. Follette,</u> 18 F.2d 1266 (2nd Cir.) <u>cert. denied</u> , 395 U.S. 1050 (1969)	15
<u>United States v. Dioguardi,</u> 492 F.2d 70 (2d Cir.) <u>cert. denied</u> 419 U.S. 873 (1974)	15
<u>United States v. Docherty,</u> 468 F.2d 989 (2d Cir. 1972)	14
<u>United States v. Dorszynski</u> 418 U.S. 424 (1974)	
<u>United States v. Fassoulis,</u> 445 F.2d 13 (2d Cir.), <u>cert. denied</u> , 404 U.S. 858 (1971)	16

	<u>Page</u>
<u>United States v. Flannery,</u> 451 F.2d 880 (1st Cir. 1971)	15
<u>United States v. Ford,</u> 550 F.2d 732 (2nd Cir.), <u>cert. granted,</u> U.S. , (1977)	2
<u>United States v. Johnson,</u> 513 F.2d 819 (2d Cir. 1974)	14
<u>United States v. Lipton,</u> 467 F.2d 1161 (2d Cir. 1972) <u>cert. denied,</u> 410 U.S. 927 (1973)	15

Table of Statutes

U. S. Constitution, Amendment V	1,9,15
18 U.S.C. §371	3
18 U.S.C. §924(c) (1)	3
18 U.S.C. §2112(a)	3
18 U.S.C. §2312	1,3,11,13,14,16

UNITED STATES COURT OF APPEALS
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Docket No. 77-1451

UNITED STATES OF AMERICA,
Appellee,

-v.-

JAMES PATRICK FLYNN,
Defendant-Appellant

BRIEF OF DEFENDANT-APPELLANT
JAMES PATRICK FLYNN

Issues Presented

1. Whether evidence that Flynn was present in a room is such evidence that Flynn was in possession of a car used as identification in the renting of that room as will support a conviction for interstate transportation of a stolen vehicle.
2. Whether it is error to charge that defendant has a constitutional right not to take the stand but to omit to charge that no negative inferences may be drawn from the exercise of that right.

3. Whether it is error to sentence a defendant for participation in crimes after a jury has acquitted him of such participation.

STATEMENT OF THE CASE

Preliminary Statement

James Patrick Flynn appeals from a judgment of conviction entered on July 1, 1977, in the United States District Court for the Southern District of New York following a nine-day trial before the Honorable Constance Baker Motley, United States District Judge for the Southern District of New York, and a jury.

Indictment S.74 Cr. 336, filed April 3, 1974, charged Flynn and co-defendant Richard Thomson Ford* with the October 20, 1971 robbery of the Orange County Trust Company in Middletown, New York. \$203,938 was taken. The four-count indictment charged: 1) conspiracy to transport a stolen car in interstate commerce, to commit bank robbery, and to use firearms in the course of

*

Ford was tried and convicted while Flynn was a fugitive. Ford's conviction was reversed on appeal for violation of the speedy trial provisions. 550 F.2d 732(2d Cir. February 3, 1977). The Government's petition for certiorari was granted. The matter is now before the Supreme Court.

the bank robbery (18 U.S.C. §371); 2) transportation of a stolen car in interstate commerce (18 U.S.C. §2312); 3) the October 20, 1971 bank robbery (18 U.S.C. §2113(a)); and 4) the use of firearms in committing that robbery (18 U.S.C. §924(c) (1)).

Flynn was arrested on February 14, 1977. Trial commenced on May 11, 1977. On May 23, 1977, and after two full days of deliberation, the jury found Flynn guilty of conspiracy and of interstate transportation of a car (Tr.1127)**

On July 1, 1977, Judge Motley sentenced Flynn to five years on the conspiracy count and to three years on the transportation count. The Court ordered "the sentences to run consecutively with each other." Flynn is currently serving his sentence.

**Parenthetical citations are to the page of the trial transcript and, where relevant, to the name of the witness testifying. The pages cited are included under their original pagination in the Flynn Appendix.

THE GOVERNMENT'S CASE

On Wednesday, October 20, 1971, at 11:15 A.M., three masked men entered the Silver Lake Branch of the Orange County Trust Company* in Middletown, New York (Nielson Tr. 158-161). Two of the men carried revolvers; the third carried a shotgun (Nielson Tr. 163-164). The employees were "scared to death" (Nielson Tr. 162). The robbers took \$203,937.32; none was ever recovered (Heath Tr. 195). No bank photographs were taken during the robbery (Heath Tr. 194). None of the five bank witnesses called at the trial could identify any of the robbers, although one witness spotted the beige get-away car and recorded a portion of its license number (Bambakos Tr. 232).

A witness outside of the Bank recalled the beige get-away car and identified Ford as the driver (Whooley Tr. 308,312); she could not identify Flynn as an occupant of the car (Whooley Tr. 305,330). A second Middletown witness observed the robbers drive into a school parking lot in the beige car and leave in a blue Plymouth (McCoy Tr. 373, 374-375). The second witness could not identify

* The Bank was insured by the Federal Deposit Insurance Corporation (Stipulation Tr. 156).

Flynn as one of the occupants of the cars ("This gentleman here [Flynn] bears a resemblance, but I can't be sure". McCoy, Tr. 388). The blue Plymouth was abandoned in Middletown (Holik, Tr. 264-270).

The blue Plymouth was the car which the Government charged was stolen and transported in interstate commerce. Defense counsel stipulated with the Government that the blue Plymouth, Massachusetts registration 43965F, had been stolen from Hertz Rent-A-Car at Logan Airport in Massachusetts on or shortly after October 18, 1971 (GX71-11, Tr. 59,508). The Government sought to connect Flynn to the stolen car by showing Flynn's home telephone number to be 617-265-2395 (Buckley Tr. 475), by showing a call from the Middletown Holiday Inn to Flynn's home between 9:00 P.M and 9:59 P.M. on October 18, 1971 (Blacha Tr. 529-530, 540-541); that one Robert P. Barry* registered in the Holiday Inn Room 123, as a party of two on October 18, 1971 at 11:00 P.M. and noted the make of his car as Plymouth and the registration as "Mass. 439-65F" (GX 17-19, Tr. 509,868); and that Flynn's fingerprint was found in

*Apparently an alias (stipulation GX20, Tr. 59,523).

that Room 123 on November 2, 1971 (Nemecek Tr. 585; Cloyed Tr. 597).

There was some evidence connecting Flynn to Ford. On the night a call was made to Flynn's home telephone, a call was also made from the Middletown Holiday Inn to the Greenwood Lake telephone used by Ford (Blacha Tr. 543; Pina Tr. 716, 718-720). On October 12, 1971 (8 days before the robbery), James Flynn sent a money order to Ellen Fitzgerald (GX111, Tr. 46-47). Ellen Fitzgerald was an alias used by Ford's wife (Tr. 37-58).

The balance of the Government's case showed Flynn had honored a Grand Jury subpoena (Rakoff Tr. 442), then fled after the indictment herein was filed on April 3, 1974 (Rakoff Tr. 447-463) and remained a fugitive until arrested on February 14, 1977 (Rakoff Tr. 462-463; Costa Tr. 60). There were some false statements imputed to Flynn. When questioned about Middletown, Flynn told the agent "You took me unawares" (Riley Tr. 671). On his arrest, Flynn denied having identification which the Government contends was untrue since, in fact, Flynn was carrying false identification (Costa Tr. 67-71, 99); Flynn denied having been notified of the filing of the indictment

(Pieroni Tr. 132; Cooperstein Tr. 806); at the bail hearing after his arrest Flynn said he was employed at Millis Transportation Company (Engel Tr. 146), although Flynn was not then so employed (Miller Tr. 623-624). Flynn paid \$11,357. in cash as a down payment on a house on March 20, 1972 (Derian Tr. 484-486,481).

THE DEFENSE CASE

Flynn did not take the stand and did not offer any evidence.

The Government Comment on the 5th Amendment Privilege in Summation and the Court's Cure in the Charge

The theme of the Government summation was to review the evidence and then to assault the defense with a series of questions.

"Those questions, ladies and gentlemen, cry out for answers. Why did he run? Why did he hide? Why did he deny being in Middletown? Why was his fingerprint in the room? Where in the world did all the cash come from?"

"ladies and gentlemen, innocent men don't run, they don't hide and they don't lie. They run, ladies and gentlemen, when they suspect that the jig is up and they hide, ladies and gentlemen, when they have reason to hide and they lie when they know that the truth will expose them."
(Tr. 941).

When the theme was repeated, the defense moved for a

mistrial on the ground that the argument in effect was a comment on Flynn's not taking the stand.

"*** Ladies and gentlemen, the main defense here is what I call an ostrich defense. You stick your head in the sand, you forget the cash, any mention. Was there a concession that it was now Mr. Flynn after all of that at the trial? Is it now conceded that Mr. Flynn was the man there at South Weymouth Bank with the \$11,357 in cash? Any suggestion of where Mr. Flynn could have gotten that much cash on his salary?

MR. CHISHOLM: I have a motion to address to the Court right now, your Honor.

THE COURT: Approach the bench.
(At the side bar.)

MR. CHISHOLM: Your Honor, the defendant moves for a mistrial for the reason that the most recent point of argument by Mr. Buchwald is in effect commenting on the defendant not taking the stand. "(Tr. 1006).

The Court denied the motion (Tr. 1008).

The Court then charged the following with respect to the defendant's Constitutional right that should he elect not to testify, such election may not be considered against him (or for him) by the jury in anyway in its deliberations:

"In considering whether possession of recently stolen property has been

satisfactorily explained, the jury will bear in mind that in the exercise of Constitutional rights the defendant need not take the witness stand and testify. Possession, however, may be satisfactorily explained through other circumstances or other evidence already in the case independent of any testimony of the accused." (Tr. 1050).

The Court's charge is fatally deficient in that it omits to instruct the jury that they may not consider the defendant's exercise of his Constitutional rights against him in the course of their deliberations. Such an incomplete statement of Flynn's 5th amendment rights is plain error.

THE SENTENCE

Although the jury after thorough deliberations acquitted Flynn of the bank robbery and weapons charges, nevertheless the Court sentenced Flynn to consecutive terms on the interstate transportation and conspiracy counts relying in major part on the crimes unproven at trial:

"This is a major robbery involving the theft of over \$200,000. The jury found that you were part of the conspiracy to commit that bank robbery and that you transported the car from Massachusetts which was used in the bank robbery. That is a major serious crime. The evidence shows the bank robbery was committed with the use of firearms, endangering other people's lives, Mr. Flynn. These are not

minor crimes.

"Therefore, the judgment of the Court is that the defendant be sentenced for a term of five years on the conspiracy count to be followed by a term of three years on the second count." (November 29 [July 1], 1977, transcript, pp. hpd 10-11).

To sentence Flynn for crimes for which a jury acquitted him is error.

ARGUMENT

POINT ONE

EVIDENCE OF PRESENCE IN A ROOM IS NOT
SUCH EVIDENCE OF POSSESSION OF A STOLEN
CAR WHICH WILL SUPPORT AN 18 U.S.C.
§2312 CONVICTION

18 U.S.C. §2312 provides in pertinent part:

"Whoever transports in interstate
or foreign commerce a motor vehicle
*** knowing the same to have been
stolen [shall be guilty of a crime]."

There are three elements to the crime: 1) the car
must have been stolen; 2) the defendant must have known
it to be stolen, and 3) the stolen car must have been
transported in interstate commerce.

The law is clear that recent and unexplained
possession in one state of a car stolen in another state
may give rise to an inference that the party in possession
transported the vehicle and knew that it was stolen. *

*Perhaps with the automobile our modern horse and auto-
mobile thieves the modern horse thief, the law of §2312
has been forged by the Courts of the West and South.

However, Courts scrutinize the evidence of possession with special care to be sure that the Government has run the race to verdict with deliberate speed.

"The narrow issue we decide is the sufficiency of the evidence of possession. Because unexplained possession of a recently stolen vehicle permits substantial inferences which may help prove two substantial elements of the government's case, the evidence relied on as proof of possession must be scrutinized with care to prevent injustice [Citation omitted]. A mere suspicion of possession will not support the inferences of transportation and guilty knowledge [Citation omitted]." Fitzpatrick v. United States, 410 F.2d 513, 513 (5th Cir. 1969).

Possession means more than being in or around a stolen vehicle. Id., at 516. Evidence that a defendant was a passenger in a stolen vehicle does not alone prove the possession necessary to give rise to the inferences of transportation and guilty knowledge. Ibid. Fingerprints on the interior of the automobile, standing alone, are not sufficient to show possession. Ibid; Camilla v. United States, 207 F.2d 339 (6th Cir. 1953).

The trial evidence taken in the light most favorable to the Government shows only that Flynn was in Room 123 of the Holiday Inn in Middletown on the same night a party of two which gave the registration of a stolen car

as identification rented that room. From presence in the room, one must infer the use of a stolen car as identification; from the use of a stolen car as identification, one must infer possession of that car; from possession of the stolen car, one must infer the possession and transportation elements of §2312. The piling of an inference on an inference is not permitted to prove a §2312 violation.

"In order to use this rationale to support a conviction on the transportation count, one must first infer possession of the entire vehicle from the fact that appellant was a passenger in another car carrying parts of the stolen vehicle. From that inference, one must then infer that appellant was involved in transporting the vehicle across the state line with knowledge that it was stolen. In a circumstantial evidence case, that much of an inference should not and cannot be allowed." United States v. Casey, 428 F.2d 229,231 (5th Cir.), cert. denied, 400 U.S. 839 (1970).

The Government called some forty-two witnesses against Flynn. Each presented some scrap of evidence relevant to the crime, or to Ford's background, or to Flynn. It is difficult to cut through one's admiration for the indomitable ingenuity of the Government to the bedrock of the evidence connecting Flynn to the crime for which he was convicted. That crime was the transportation of

a stolen car. The evidence put Flynn in a room; that room was connected to the stolen car. The conclusion that Flynn was in possession of the car was a reasonable one; the more so here where Flynn has not explained himself. The conclusion might even satisfy the preponderance of the evidence test; it does not satisfy the criminal standard of §2312.

"The conclusion from that, that [defendant] had possession of the car is not unreasonable. Perhaps it would satisfy a preponderance test. But when convicting presumptions [Footnote omitted] are projected on possession, the evidence of possession ought to be very clear to satisfy the test of guilt beyond a reasonable doubt." Julian v. United States, 391 F.2d 279, 279-280 (9th Cir. 1968) (defendant found asleep in stolen car with owner's wallet in his pocket; held insufficient).

Mere presence at the scene of a crime is insufficient. Presence is insufficient even if the defendant's exculpatory statements were proven false. United States v. Johnson, 513 F.2d 818, 823-824 (2d Cir. 1974). The conviction of Flynn on the conspiracy count cannot survive unless there was sufficient evidence to show the violation of substantive law charged in it. United States v. Docherty, 468 F.2d 989, 992 (2d Cir. 1972).

POINT TWO

A CHARGE ON THE DEFENDANT'S RIGHT
NOT TO TAKE THE STAND WHICH OMITS
TO STATE THAT NO UNFAVORABLE INFER-
ENCES MAY BE DRAWN THEREFROM IS
CONSTITUTIONALLY INFIRM

The Second Circuit's rule on Governmental comment in summation on the defendant's failure to take the stand is lenient in the extreme. Compare United States ex rel. Leak v. Follette, 418 F.2d 1266, 1270 (2nd Cir.) cert. denied, 395 U.S. 1050 (1969) and United States v. Cusumano, 429 F.2d 378, 381 (2d Cir.), cert. denied 400 U.S. 830 (1970) with United States v. Flannery, 451 F.2d 880, 882 (1st Cir. 1971), and People v. Armstrong, 31 A.D. 2d 447, 298 N.Y.S.2d 630, 635 (1st Dep't 1969).

When the Government does make an impermissible comment, prompt curative instructions by the Court may resolve the error. United States v. Dioguardi, 492 F.2d 70, 81 (2d Cir.), cert. denied, 419 U.S. 873 (1974); United States v. Lipton, 467 F.2d 1161, 1169 n. 16 (2d Cir. 1972), cert. denied, 410 U.S. 927 (1973). But those curative instructions must be correct and complete to effect the cure. The Court must charge the jury that no unfavorable inference may be drawn from the defendant's failure to testify.

United States v. Brown, 511 F.2d 920, 925 (2d Cir. 1975);
United States v. Fassoulis, 445 F.2d 13, 18 n. 9 (2d Cir.)
cert. denied, 404 U.S. 858(1971).

Judge Motley, in charging that Flynn had a constitutional right not to take the stand, but omitting to add that the jury could not draw negative inferences from Flynn's failure, committed plain error on a matter of constitutional import. That error committed in this circumstantial evidence case under §2312 mandates reversal.

POINT III

IT IS ERROR TO SENTENCE A DEFENDANT
FOR THE COMMISSION OF A CRIME ON WHICH
THE JURY HAS ACQUITTED

Appellate review of criminal cases properly encompasses "the careful scrutiny of the judicial process by which the particular punishment was determined." United States v. Dorszynski, 418 U.S. 424,433 (1974). Here, Judge Motley sentenced Flynn for the commission of crimes (\$200,000 robbery of a bank and the use of fire-arms) after a jury trial in which Flynn was acquitted of those crimes. Reversal and remand for a new sentence is required.

CONCLUSION

Flynn's judgment of conviction should be reversed and the indictment dismissed.

Dated: New York, New York
January 4, 1978

Respectfully submitted.

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